

TO: Public Safety Civil Service Commissioners

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Subject: Military Personnel and Promotional Exams

Date: February 1, 2010

Introduction

The purpose of this memo is to explain to all interested parties (including Commissioners and Commission staff, Firefighter Andrew Young and other prospective and current promotional applicants, the Police and Fire Departments, the Personnel Department, and affected public safety unions) some of the rather complicated issues associated with attempting to determine the best way to implement the Uniformed Services Employment and Reemployment Rights Act (USERRA) in the context of City of Seattle Public Safety Civil Service promotional examinations.

The Commission plans to consider this matter at its February 26, 2010 regular meeting, and hopes to hear the views of the various interested parties.

Makeup Promotional Examinations – Military Service

There are two questions that arise with makeup promotional examinations missed due to active military service. First, what actions must the Public Safety Civil Service Commission (PSCSC) take when an employee missed a promotional examination due to active military service? Second, how should the PSCSC address issues of this nature to ensure that future promotional examinations do not discriminate against employees in active military service?

Background

Firefighter and police officer promotional exams are typically comprised of a written examination followed by an assessment center, also known as oral boards (there are slightly different procedures for the Fireboat Engineer, Fireboat Pilot, and Police Captain examinations). The promotional exam for each rank is administered approximately every two years. Each time the examination is administered, it is rewritten to ensure it is job-related and non-discriminatory. After the examinations are scored, there is a three-day

protest period during which test takers can protest exam questions for being inapplicable in scope, content, or practicality.

A bibliography of study materials is provided a minimum of 90-days (Fire) or 180-days (Police) prior to the examination. The bibliography includes all materials used to create the written examinations. Both firefighters and police officers have access to materials from their respective departments.

Assessment center examiners, used for the oral portion of the examination, are recruited nationally. Nine examiners are used for the majority of assessment center exams. These examiners do not have ties to the City of Seattle. The purpose of recruiting nationally is to ensure that bias plays no role in the final rankings of the exam candidates.

The candidates are ranked based on the results of the Promotional Examination. The written examination comprises one portion of their score, while the oral (or practical) portion comprises the remaining portion. The veteran's preference and service credits are then added to that aggregate score. Each time a new position opens, the top five candidates on the ranked register are forwarded to the promoting department. The department may promote any of the top five candidates. Most often, the highest ranking person is promoted, and everyone below the promoted candidate moves up the register.

The costs associated with creating a new promotional examination are considerable. The costs include contracting with an expert to rewrite the written and oral (or practical) examination questions and exercises. This expert works with a committee of Department Subject Matter Experts (SME) for the particular exam. These SMEs often qualify for overtime payments for their participation. Additionally, the assessment center costs can include renting a secure facility, hiring and training the examiners, and reimbursing travel accommodations for up to nine assessors. The promotional exam process costs approximately \$80,000. The questions and keyed answers are made public shortly after the examination is administered. An examinee may ask the Commission to review the questions and keyed answers.

Issue 1: Whether the PSCSC must provide a makeup promotional examination or some other accommodation when an employee missed the promotional examination due to active military service.

Probably. PSCSC is likely required to provide some accommodation to a firefighter or police officer who missed a promotional examination due to active service. However, a makeup promotional Examination may not be required.

The Uniformed Services Employment and Reemployment Rights Act's (USERRA) purpose is:

(1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;

(2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and

(3) to prohibit discrimination against persons because of their service in the uniformed services. 43 USC § 4301

The Seventh Circuit Court of Appeals recently decided a relevant case. In *Sandoval v. City of Chicago*, two police officers took promotional examinations while on Active Duty in El Salvador and Iraq. In both cases, the examinations were administered at the closest Ernst & Young office. This was the same accommodation provided to officers located outside of Chicago for other leave purposes. The Plaintiffs argued that the examination should have been administered on the military base rather than in the Ernst & Young Offices, but neither officer made this request prior to the examination. *Sandoval v. City of Chicago*, 560 F.3d 703 (7th Cir. 2009)(*cert. denied* 2009 WL 1975941 (Oct. 5, 2009)).

The *Sandoval* Court determined that USERRA, unlike other non-discrimination statutes, did not require affirmative accommodations. It simply prohibits discrimination. However, the Court also stated that taking a test “required for promotion is a ‘benefit of employment’ that Chicago may not deny to persons in the armed service.” *Id.* at 705. Administering the remote examination in the closest Ernst & Young Office was sufficient. *Id.*

The *Sandoval* Appeals Court did not address one important fact discussed by the Trial Court. The Trial Court found that although Sandoval was able to take and pass the examination remotely, he was not able to make up the 2004 field training required for the promotion upon his return. Instead he had to wait until the next scheduled field training, and he consequently was not promoted until 2007. The Trial Court found that since Sandoval was given back pay and service credits as though he was promoted in 2004, he was not denied benefits. *Sandoval v. City of Chicago*, 2008 WL 2743750 (N.D.Ill. 2008). The Appeals Court simply did not discuss the reasonableness of this time gap nor the reasonableness of the retroactive promotion.

Department of Labor (DOL) Federal Regulations state that if the employee missed a promotional examination during service, the employer “should give him or her a reasonable amount of time to adjust to the employment position and then give the skills test or examination.” 20 C.F.R. § 1002.193. One of the criteria for determining a reasonable time is “the typical time necessary to prepare or study for the test.” *Id.*

The DOL Regulations require a makeup test to be offered within a reasonable time considering the facts and circumstances. The enumerated considerations listed to determine reasonable amount of time tend toward an employer forcing the employee to take the examination *earlier*, rather than requesting they take the examination at the *later*, next scheduled examination. *See* 20 C.F.R § 1002.193(b).

The Regulations further state that

[i]f the employee is successful on the makeup exam and, based on the results of the exam, there is a reasonable certainty that he or she would have been promoted...during the time that the employee served in the uniformed services, then the promotion...must be made effective as of the date it would have occurred had employment not been interrupted. *Id.*

It seems that either the *Sandoval* or the DOL Regulations apply depending on the facts and circumstances of each case. If the employer accommodates the active military employee by coordinating an examination proctor in a remote location, the *Sandoval* case controls. However, if the employer does not offer a remote examination, the DOL Regulations control.

The question becomes what is reasonable in providing a makeup examination.

Reasonable Time

At a minimum, the City should give a candidate the same amount of time and access to materials to study for the examination that was given to the other applicants (a bibliography of materials upon which the examination is written is provided either 90 or 180 days before the written portion of the promotional exams). Under 20 C.F.R § 1002.193(b), firefighters and police officers returning from active military duty should be given at least the same amount of time to prepare as the rest of the applicant pool. The same amount of time should also be given between the administration of the written and oral portions of the exam.

Considering the proximity of the next available test, which takes place within a maximum of 2-years, along with the cost and accommodation analysis below, using the next scheduled examination is arguably reasonable as a makeup accommodation.

Reasonable Costs

The next consideration relates to costs. Employer cost is not one of the considerations enumerated in the Department of Labor (DOL) Regulations. However, there are significant costs to providing firefighter and police officer makeup examinations. A consultant is paid to create written and oral examination questions and exercises to ensure

the process does not run afoul of other non-discrimination requirements. It takes approximately six months to create the examination. The assessment center examiners, normally nine examiners, are recruited throughout the country. The recruitment, hiring, training, and travel expenses associated with this process are costly. The estimated cost of creating a makeup examination is approximately \$70,000, which is almost as expensive as the regular exam process.

The Regulations do not talk about costs. However in *Sandoval*, the Court notes that the Plaintiffs gave no thought to the costs of their requests. “Congress usually sets limits on the expense and inconvenience that an employer must bear to provide that benefit.” *Sandoval*, 560 F.3d 703, 708. Congress did not set a cap on costs in USERRA, but presumably employer costs play some role in a reasonableness inquiry.

Reasonable Accommodations

If the candidate would have been eligible for promotion during the time he or she was waiting to makeup the promotional examination, the candidate could also be placed at the top of the subsequent promotional register making him or her next in line for consideration for a promotion.

The District Court hearing the *Sandoval* Court case found that a retroactive promotion dating back to the time of the original examination “moot[ed] any assertion that Sandoval was denied the benefits he would have received had he been promoted to field training officer in 2003.” *Sandoval v. City of Chicago*, 2008 WL 2743750 at 6 (N.D.Ill. 2008)(Sandoval passed the examination given at Ernst & Young in 2003, but was not given the opportunity to complete required field training until 2006 or 2007. In 2007, he was given back pay and service credits as though he was promoted in 2003).

Unfortunately, there are no precedential cases that would indicate whether the retroactive promotion policy is reasonable. In *Sandoval*, the military employees were given the examinations at remote Ernst & Young Offices and later complained about accommodations. The *Sandoval* Appeals Court did not address whether retroactive promotions are sufficient to avoid discrimination.

It appears that having candidates wait to take the next promotional examination is defensibly reasonable as long as certain policies are implemented. First, the PSCSC must figure out where the candidate would have been placed on the original promotional register based on his or her scores on the subsequent examination. . Second, it must determine if and when the candidate would have been eligible for promotion had the promotional exam not been missed. If the department would have promoted the candidate, he or she may retroactively be given the promotion including back pay and service credits. Finally, if the candidate would have been promoted, the candidate may

be placed at the top of the promotional register, presumptively next in eligibility for an open promotional position.

Issue 2: What policy should the PSCSC implement to ensure that future promotional examinations do not discriminate against employees who are in active military services when the examination was given?

There are essentially three alternative policies that the PSCSC can adopt for future promotional examinations to ensure PSCSC does not violate USERRA: 1) accommodate makeup examination requests, 2) offer remote examinations on military bases while the candidate is on active military service, or 3) continue with current examination process with retroactive promotions.

Allow Makeup Examinations

PSCSC can facilitate makeup examinations when employees return from active military duty. This policy would require changes to the current examination process in order to be cost feasible. As discussed above, it would cost approximately \$70,000 for PSCSC to rewrite the written examination and reconvene the assessment center examiners to create a makeup examination. This is cost prohibitive.

Certain changes could be made to future examinations to mitigate these costs. PSCSC could change its appeals process. Currently, the examination answers are provided to applicants during a three-day protest period during which applicants can protest the scope, content, or applicability of questions while having access to the answers. Presumably, applicants could protest the scope, content, or applicability based on the questions alone without having access to the answers. In this scenario, rewriting the examination might be considered unnecessary because the answers would never be public. Promotional testing policies are outlined in the Civil Rules, which would need to be amended.

Alternatively, a second, backup examination could be created at the same time as the original examination. Currently, an examination consultant often writes up to 1,000 questions that are ranked by department employees. A second, backup examination could be created at that time.

Either option would still require a reconvening of the assessment center for the oral portion of the examination when the military employee returns. The cost of such an alternative examination and second assessment center convention are unclear and may still be cost prohibitive.

Adding the military employee to the promotional register based on an alternative exam score would be difficult, since it would be hard to accurately compare the two result registers when the alternative exam is only completed by a small number of candidates.

This would open the door to potential appeals based upon the unfair merging of the test results.

Offer Remote Examinations at Military Bases

PSCSC could also allow active military personnel to take the examinations on their military base or other remote location. The *Sandoval* case held that such examinations fulfill the non-discrimination requirements.

The issues with this policy are more practical than legal. Military advocates and the Federal Regulations promote the practice of offering makeup examinations after the employee returns from service. This minimizes the potential negative consequences of studying for and taking the examination in an active war zone. Someone studying and testing in an active war zone simply does not have the same opportunity to concentrate as a person studying and testing in Seattle. Further, the active military candidate might not have access to the same materials as candidates studying in the City of Seattle.

The military's ability to administer the written and oral examinations are unclear. The costs and effectiveness of such accommodation are unknown.

Continue Current Examination Process with Retroactive Promotions

PSCSC can continue its policy not to offer makeup examinations because the next scheduled examination takes place within a reasonable timeframe. A discussion of why this is reasonable and defensible is included above.

If this is the policy chosen, PSCSC should provide clear notification of applicable policies before the military employees leave on active leave. PSCSC should also clearly determine how it will retroactively certify for promotion employees who miss the test due to active military service. Having a clear and generous retroactive certification policy will bolster the City's position that the policy is reasonable.